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Supreme Court, U.S.
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No. 03-377

IN THE

Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY FOR THE PETITIONER

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REPLY FOR THE PETITIONER

The opinion of the court below is a caricature of strict construction. It reaches the highly implausible conclusion that the Truth in Lending Act's (TILA) statutory damages remedy, 15 U.S.C. § 1640(a)(2)(A)—which provides a private cause of action for borrowers against consumer lenders without any showing of actual harm or culpable intent—was amended in 1995 to eliminate the $1,000 cap on recoveries that previous court's have uniformly found applicable. It does so based on the erroneous premise that the words of the statute "compel[]" this interpretation "regardless of [Congress's] intent." Pet. App. 13a.

Respondent's opposition echoes the reasoning of the Fourth Circuit, maintaining that the words of the statute as amended in 1995 are clear and unambiguous and that is the end of the inquiry. But as the Petition for Certiorari demonstrates, the Fourth Circuit's reading gives a far-from-tidy account of the statute's language and is flagrantly at odds with all indicia of legislative history and purpose.

As the petition further demonstrates, the Fourth Circuit's ruling is directly contrary to the decision of the Seventh Circuit in *Strange v. Monogram Credit Card Bank*, 129 F.3d 943, 947 (7th Cir. 1997), and thus creates a sharp disagreement among the federal courts on an issue of extraordinarily broad relevance, given TILA's coverage of many millions of transactions every year.

Because the decision below results in drastic increases in potential recoveries (equal to double the finance charge in each instance of a technical violation) that are entirely unrelated to actual harm suffered, it will lead to quite divergent results depending where a case arises. It will also likely cause a rash of speculative litigation. For these reasons, and because the legal issue presented is a quite straightforward one—which would not benefit from further percolation in the lower courts—this Court should grant certiorari and reverse the decision of the court below.

Respondent opposes this Court's review, arguing that the Seventh Circuit's decision in *Strange* does not create a "meaningful split," that the vastly increased potential exposure of creditors

"offer[s] no basis for review," and that the decision below is obviously correct. All of those contentions are without merit.

The *Strange* decision creates a clear and direct split on whether the $100-$1,000 limitation found in Section 1640(a)(2)(A) applies to statutory damages under subsection (i). Moreover, the Seventh Circuit in *Strange* fully considered the issue as part of its holding and reached a conclusion diametrically opposite to the court below. Contrary to Respondent's contention (Opp. 6) that the "opinion in *Strange* does not disagree with the Fourth Circuit below that the plain meaning" sets no statutory minimum or maximum on recovery under subsection (i), the Seventh Circuit in fact concluded that the statutory language contains an "ambiguity." 129 F.3d at 947. In the face of this ambiguity, the Seventh Circuit appropriately looked to "the history" of the provision, and held that "the 1995 amendment," which introduced the ambiguity by adding subsection (iii), "was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damage awards" for subsection (i). *Id.*

Contrary to Respondent's assertion, *Strange* is not "a weak precedent," simply because the 1995 amendment occurred after the events at issue in the case. Opp. 6. It is an established "principle that a court is to apply the law in effect at the time it renders its decision," and this principle only gives way for "new rules of law . . . that would have genuinely 'retroactive' effect." *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 277 (1994). Having first found that the 1995 amendment to Section 1640(a)(2)(A) did not work a substantive change on the defendant's liability under subsection (i), the *Strange* court acted entirely appropriately in applying the current law—TILA as amended in 1995. Further, in all events, the parties in *Strange* did not dispute the application of the 1995 TILA amendments to their dispute, making the Seventh Circuit's interpretation of the provision binding precedent by any measure.

As a second argument for denying review, Respondent dismisses concerns about the likely consequences of the decision below. He notes that the fact that TILA is the most commonly violated consumer protection statute simply means that "the cure is to

provide consumers with more . . . incentives to enforce their rights," which is exactly the result of the Fourth Circuit's reading. Opp. 8.[1]

Apart from the crazy-quilt pattern of liability that results, and the utter absence of evidence that Congress ever considered let alone intended this result, this argument also ignores the fact that the complex and detailed nature of TILA's requirements means that technical violations will and do routinely occur despite the industry's best efforts. Indeed, as was aptly explained in the amicus brief filed by three of the nation's principal consumer-credit associations, this additional imposition of capricious and erratic liability will actually impair the availability of consumer credit without affording any concomitant increase in TILA compliance:

> Victories for TILA plaintiffs under the [Fourth Circuit's] new rule will be harmful to consumers nationwide because of increases in the cost of credit. Importantly, there is no reason to believe that the massively increased TILA liability that was brought about by the [Fourth Circuit's] decision will result in improved disclosures by creditors like members of amici. Those institutions already are largely successful at meeting their TILA obligations; and those violations that do occur are the result of the hyper-technical nature of the statutory and regulatory requirements and will not be cured by imposing greater punishment.

See Brief of ABA, AFSA and CBA as Amici Curiae 16 (internal citation omitted).

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[1] To be sure, Respondent also argues that there are no "current" decisions stating that TILA has "result[ed]" in undue or unjustified litigation." Of course, Respondent fails to acknowledge that the absence of decisions discussing "undue or unjustified [TILA] litigation" is due in large measure to the long-standing $1,000 cap on statutory damages under subsection (i), which thus far remains the law under decisions of other circuits based on the pre-1995 amended TILA. *See Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996); *Dryden v. Lou Budke's Arrow Fin. Co.*, 661 F.2d 1186, 1191 n.7 (8th Cir. 1981).

Thus, as the Seventh Circuit in *Strange* put it, and as the briefs of the amici in this case make clear, this case squarely presents an issue of"considerable commercial interest." *Strange*, 129 F.3d at 947. *See also* Brief of ABA, AFSA and CBA as Amici Curiae 8 ("The potential for harm—to consumer lenders . . .; to manufacturers dependent on consumer purchasing; to consumers themselves; and to the national economy, which is driven by consumer spending—is difficult to overstate"); Brief of VADA, MNCTDA and WANADA as Amici Curiae 8 ("[The Fourth Circuit's] decision has an incalculable impact upon credit grantors, impacting the individuals to whom they may grant credit, the terms on which credit may be granted, the cost of putting procedures in place for granting credit, and other similar critical issues.").

Respondent's third and final basis for opposing review—that the Fourth Circuit's decision is supported by the "unambiguous language of the statute"—is wrong and does not counsel against review. Even looking solely at the words of the statute and ignoring its history, as Respondent urges the Court to do, Section 1640(a)(2)(A) is untidy and unclear,[2] and not "plain" and "unambiguous." In particular, the Fourth Circuit's reading

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[2] Section 1640(a) of TILA provides, in pertinent part, that:

(a) [A]ny creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000.

15 U.S.C. § 1640(a) (2000).

necessitates the conclusion that the word "subparagraph" as it appears at the end of subsection (ii) changed its meaning as a result of the 1995 amendment that expressly altered no substantive words in the pre-existing sections. One must also conclude that the same word means something different in subsection 2(A) than it does in the immediately adjacent subsection 2(B), which likewise was untrue before 1995. Pet. 22. Further, the Fourth Circuit's unforgiving approach of rigidly ascribing to each of the three subsections only the words expressly associated with it would leave subsection (iii) devoid of any primary measure of liability, as Congress did not bother to expressly note that the "twice the amount of the finance charge" measure that appears in (i) was incorporated into (iii). *Id.* at 23.

When the ambiguity of Section 1640(a)(2)(A) is considered alongside the history and context of the 1995 amendments to the provision, the Fourth Circuit's error becomes obvious. Since 1968, the substantive provision that is now Section 1640(a)(2)(A)(i) has allowed a nominal recovery of up to $1,000 for technical violations of TILA without any showing of actual damages. In 1995, the statute was amended for the purpose of increasing the range of the statutory recovery for mortgage loans to $200 to $2,000, and this purpose was expressly confirmed by the legislative history. Neither the language of the enactment, which simply includes the new subsection (iii), nor the legislative history, suggests any intention to accomplish the far more radical objective ascribed to it by the Fourth Circuit.

Moreover, the statute that results from the Fourth Circuit's reading is strange, bordering on the bizarre. Without any showing of actual damages, plaintiffs proving violations related to leases and closed-end mortgages may secure no more than $1,000 and $2,000 respectively. But claimants under the statute's original provision applicable to the great bulk of technical TILA violations may recover much larger and widely varying amounts without regard to the fact or extent of any injury, and potentially exceeding the constitutionally-permissible bounds of exemplary damages under the Fifth Amendment's due process clause. *See, e.g.*, *State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003).

There is simply no necessity or occasion here to read the statute in the strange and disruptive manner adopted by the court below. Given the straightforward nature of the issue presented—whether or not the $100-$1,000 limitation applies to subjection (i)—there is no reason to await decisions by other circuits.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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